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Supreme Court of the United States

October Term, 1943. No. 243

SOLOMON G. SALOMON,
Petitioner,

against

THE CITY OF NEW YORK, *et al.*

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

September 2, 1943.

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THE CITY OF NEW YORK, *et al.*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Petitioner is a holder of 7% Guaranteed Stock of Manhattan Railway Company (hereinafter referred to as "Manhattan"). He seeks the reinstatement of equity receivers for Interborough Rapid Transit Company (hereinafter referred to as "Interborough") and Manhattan, both of whom were finally discharged in August and September, 1941, or the appointment of successors of such receivers, so that they may negotiate with each other and with the City of New York for a lease covering the Manhattan elevated railroad properties (R. 4, 28-29, 38).* These properties were acquired by the City in unification on June 12, 1940, and most of them have since been razed. Petitioner's position is that such negotiations must be carried out pursuant to the mandate of the Circuit Court of Appeals, Second

* The history and complexity of the legal relations between Interborough, Manhattan, their respective security holders and the City, are fully set forth in *Murray* v. *Roberts*, 103 F. (2d) 889 (2nd Circ., 1939) and *American Brake Shoe & Foundry Co.* v. *Interborough Rapid Transit Co.*, 122 F. (2d) 454 (2nd Circ., 1941), cert. denied *sub nom. Manheim* v. *Merle-Smith*, 315 U. S. 801 (1942), and in the interest of brevity will not be restated here.

Circuit, in the Interborough-Manhattan lease litigation, *Murray* v. *Roberts,* 103 F. (2d) 889 (1939), petition for certiorari dismissed per stipulation, 311 U. S. 720 (1940). The District Court denied the application with an opinion (R. 38-40), and an order, dated December 28, 1942, was entered thereon (R. 40). Upon petitioner's appeal from this order to the Circuit Court of Appeals for the Second Circuit, respondents made a motion for an order affirming the order of the District Court pursuant to Rule 7, par. 4, of the Rules of this Court * and Rule 7 of the Circuit Court of Appeals (R. 1). That Court granted the motion without opinion and entered an order, dated April 30, 1943, affirming the order of the District Court (R. 44).

(1)

Petitioner has pinned his hopes in this proceeding on a single sentence in the opinion of the Circuit Court of Appeals in *Murray* v. *Roberts, supra,* 103 F. (2d) 889, pet. for cert. dismissed, 311 U. S. 720. After reviewing the franchise obligations of Interborough to the City—not to Manhattan or its security holders—the opinion of Judge Learned Hand concludes (103 F. [2d] at pp. 897-898):

> "He [the Interborough receiver] will reject the Manhattan lease if he is able to perform the foregoing obligations to the City by any other means than affirmance of it; but if after negotiations with the Manhattan and with the City no other means is possible than affirmance of the lease, he must affirm the lease."

Apparently, petitioner seems unable to realize that only to the City was this decision a vindication of rights—that

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* Rule 7, par. 4, provides: "The Court will receive a motion to affirm on the ground that it is manifest that the appeal was taken for delay only, or that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument."

to him (as a Manhattan security holder) it was a mere windfall. He ignores completely Judge HAND's admonition in discussing the disaffirmance issue as it affected Manhattan alone, without benefit of the City's protection (103 F. [2d], at p. 891):

> "It is an issue on which the Manhattan should not be heard; it concerns only the internal policy of the creditors and shareholders of the Interborough, in which the Manhattan, as lessor, may not intervene: the determination whether to perform, or to leave the obligee to its remedies, is to be made solely in the interests of the Interborough."

Petitioner's present attempt to obtain a review by this Court is but another instance of the monotonous persistence with which, on every occasion, he (a layman) has pressed for acceptance of his peculiar personal views of the complicated disaffirmance issue, whether or not that issue was before the Court and even after it had been fully disposed of. The Circuit Court of Appeals has had occasion to take note of his tendency in this regard.*

(2)

Our contention that the issue sought to be raised by petitioner is so unsubstantial as not to merit review by this Court rests upon two principal grounds:

(a) The rights of all parties to the receivership cause, including this petitioner as a holder of Manhattan 7% Guaranteed Stock, were completely and finally settled and adjudicated by the orders and decrees underlying the Unification Plan, affirmed in *American Brake Shoe & Foundry Co.* v.

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* See *Manhattan Railway Company* v. *Central Hanover Bank & Trust Company*, 99 F. (2d) 789, 793 (1938), cert. denied, 306 U. S. 641 (1939) and *American Brake Shoe & Foundry Co.* v. *Interborough Rapid Transit Co.*, 122 F. (2d) 454, 461 (1941), cert. denied *sub nom. Manheim* v. *Merle-Smith*, 315 U. S. 801 (1942).

Interborough Rapid Transit Co., 122 F. (2d) 454 (2nd Circ., 1941), cert. denied *sub nom. Manheim* v. *Merle-Smith*, 315 U. S. 801 (1942). The appellants on that appeal were this petitioner and one Manheim, and that decision will be referred to herein as the Salomon-Manheim appeal.

(b) The issue now sought to be raised by petitioner was again disposed of in the District Court in connection with the final discharge of the Interborough receiver. Petitioner then asked that the order of discharge reserve his asserted rights under his personal views of the disaffirmance issue, and he subsequently sought to have the order amended for the same purpose. His request was denied, and he did not appeal, either from the order of discharge or from the order denying his motion to amend.

(a)

At the threshold of petitioner's case is the fact that he asserts his claim as a holder of Manhattan 7% Guaranteed Stock (R. 24-25). In order to give even the slightest color to his appeal, he would have to show claims of that stock which have not been disposed of, but which are still outstanding and undetermined. And any possibility that such showing can be made is emphatically negatived by the decision in the Salomon-Manheim appeal.

Since the salient facts relative to the Salomon-Manheim appeal and the nature of the decision thereon appear fully in the record (R. 6-13), we shall not repeat them here. It is sufficient to point out that one of the orders affirmed on that appeal was Judge PATTERSON's order of March 15, 1940, settling the Interborough-Manhattan claims. That order allowed a definite dollar amount to be collected in cash by each holder of Manhattan 7% Guaranteed Stock on his claims against Interborough, its receiver, its receivership estate, and its security holders. That order freed the Inter-

borough properties and the proceeds of their sale from all such claims. That order also extinguished such claims and enjoined their further assertion in any Court. A more complete disposition of every phase of the claims here asserted by petitioner is impossible to imagine. The District Court (over which Judge PATTERSON presided), however, went even further: in its order of June 12, 1940, which reaffirmed a prior finding of the fairness of the Unification Plan and ordered the consummation of the Plan, it again enjoined further attempts by Manhattan stockholders, among others, to enforce their claims.

The two foregoing orders were reviewed by the Circuit Court of Appeals, Second Circuit, on the Salomon-Manheim appeal, with this petitioner in the capacity of an appellant. The orders were affirmed, and this Court denied a writ of certiorari. The Circuit Court's opinion was written by Judge SWAN, and the relevant parts thereof have already been referred to (R. 8-10). We call attention here only to the concluding portion of the opinion, which, we submit, completely disposes of petitioner's present contentions (122 F. [2d], at p. 461):

> "The contentions of appellant Salomon, a layman arguing his own case in a proceeding which Judge Patterson characterized as the most complex he had ever encountered, are quite difficult to grasp. In so far as they can be understood we agree with respondents that they constitute in substance a reargument of the disaffirmance issue, Salomon claiming, as a holder of Manhattan securities, that the rental obligations of Interborough to Manhattan should have been carried out to the letter. He further appears to contend that the certiorari proceedings in Murray v. Roberts, 2 Cir., 103 F. 2d 889, on the disaffirmance question should have been prosecuted fully and that any compromise of the vexatious questions involved was improper. As we have indicated in the treatment of the appeal of Manheim, we conclude that the

> Settlement Proceedings resolving the conflicting claims of Manhattan and Interborough were properly instituted and concluded and should not be set aside; and certainly we shall not, in any event, decide the merits of such claims as this appellant appears to desire. These issues have wisely been set at rest."

Petitioner sought to raise the same disaffirmance issues in his unsuccessful attempt to obtain certiorari from this Court. The quotations from his petitions for a writ and for a rehearing cited in the record (R. 10-13) are most revealing. They indicate clearly that petitioner is motivated by disgruntlement concerning the disposition which has been made of the disaffirmance matter rather than by a legitimate desire to obtain a decision upon an undecided point. More important still, they show that petitioner emphatically presented his present point as to the disaffirmance litigation, exhausted his remedies, and has had his day in court.

(b)

In connection with the entry of the order of the District Court on August 25, 1941, discharging the Interborough receiver, petitioner sought to reserve the alleged rights which he now asserts. He was unsuccessful in securing any such reservation (R. 13-15, 16-23). He did not appeal from the order of discharge, and the time to appeal has, of course, expired.

He subsequently moved under date of September 22, 1941, to amend the order of discharge in order to provide that the alleged benefits which he claims from the decision in *Murray* v. *Roberts, supra,* "be preserved for Manhattan Company, petitioner and others" (R. 21). This motion was likewise denied. The District Court wrote an opinion dated October 21, 1941 (R. 21-23) in which it was stated that the questions sought to be raised by this petitioner had already been disposed of, and that Salomon's remedy should have

been by way of appeal. The Court further quoted from Judge SWAN's opinion in the Salomon-Manheim appeal to show that Salomon's rights had already been fully adjudicated.

Conclusion.

The petition for a writ of certiorari should be denied.

September 2, 1943.

Respectfully submitted,

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